



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF I- LLC

DATE: JUNE 29, 2018

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a provider of software development and other information technology services, seeks to employ the Beneficiary as a software engineer. It requests his classification under the second-preference immigrant category as a member of the professions holding an advanced degree or its equivalent. Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). This employment-based, "EB-2" category allows a U.S. business to sponsor a foreign national with a master's degree, or a bachelor's degree followed by five years of experience, for lawful permanent resident status.

The Director of the Texas Service Center denied the petition. The Director concluded that the Petitioner did not demonstrate its required ability to pay the combined proffered wages of this and other petitions.

On appeal, the Petitioner submits additional evidence and asserts its ability to pay the proffered wage. The Petitioner contends that U.S. Citizenship and Immigration Services (USCIS) lacks authority to require it to demonstrate its ability to pay other proffered wages. Even if USCIS has authority, the Petitioner asserts that its payment of the prorated proffered wage to the Beneficiary in the year of the petition's priority date excuses it from demonstrating its ability to pay other proffered wages.

Upon *de novo* review, we will dismiss the appeal.

I. EMPLOYMENT-BASED IMMIGRATION

Employment-based immigration generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, an employer must first obtain certification from the U.S. Department of Labor (DOL). See section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for a position, and that employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. *Id.*

If the DOL approves a position, an employer must next submit the certification to USCIS with an immigrant visa petition. See section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS

considers whether a petitioner can pay the DOL-certified proffered wage. If USCIS approves a petition, a foreign national may finally apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

II. ABILITY TO PAY THE PROFFERED WAGE

A petitioner must demonstrate its continuing ability to pay a proffered wage, from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2).¹ Evidence of ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements. *Id.*

Here, the labor certification, with a priority date of [REDACTED] 2016, states the proffered wage of the offered position of software engineer as \$81,952 a year. As of the appeal's filing, required evidence of the Petitioner's ability to pay the proffered wage in 2017 was not yet available. For purposes of this decision, we will therefore consider the Petitioner's ability to pay only in 2016, the year of the petition's priority date.

In determining ability to pay, USCIS first examines whether a petitioner paid a beneficiary a full proffered wage each year from a petition's priority date. If a petitioner did not annually pay a full proffered wage, USCIS considers whether the petitioner generated annual amounts of net income or net current assets sufficient to pay any differences between the annual proffered wage and the wages paid. If net income and net current assets are insufficient, USCIS may consider other factors affecting a petitioner's ability to pay a proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).²

The Petitioner submitted a copy of an IRS Form W-2, Wage and Tax Statement. The form establishes that the Petitioner paid the Beneficiary wages of \$60,734.49 in 2016. This amount does not equal or exceed the annual proffered wage of \$81,952. Based solely on its payments to the Beneficiary, the Petitioner therefore has not established its ability to pay the proffered wage.

On appeal, the Petitioner notes that it need only demonstrate its ability to pay from the petition's priority date. It therefore asserts that it need only establish its ability to pay the portion of the 2016 proffered wage that accrued after the June 1 priority date. The Petitioner contends that the wages it paid the Beneficiary in 2016 exceed the prorated proffered wage of \$47,150, demonstrating its ability to pay.

¹ This petition's priority is the date the DOL accepted the accompanying labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

² Federal courts have upheld USCIS' method of determining a petitioner's ability to pay a proffered wage. *See, e.g., River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Rivzi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, 627 Fed. App'x. 292 (5th Cir. 2015).

USCIS policy, however, does not permit a petitioner to prorate a proffered wage. Although we will not prorate the proffered wage, we will consider the effect of a short time period between the priority date and the end of the priority date year in the context of our totality of the circumstances analysis. Moreover, even if USCIS policy allowed proration, the Form W-2 would not establish the Petitioner's ability to pay the prorated wage. As the Director's decision indicates, the amount on the Form W-2 includes payments the Petitioner made to the Beneficiary *before* the petition's priority date of [REDACTED] 2016. The Form W-2 therefore does not establish the Petitioner's ability to pay the full, prorated proffered wage *after* the priority date. Therefore, based on its payments to the Beneficiary, the Petitioner has not demonstrated its ability to pay the proffered wage.

Nevertheless, we credit the Petitioner's payments to the Beneficiary. In 2016, it need only demonstrate its ability to pay the difference between the annual proffered wage and the wages it paid the Beneficiary, or \$21,217.51.

The Petitioner's federal income tax returns for 2016 reflect net income of \$19,583 and net current assets of \$30,904. The net current asset amount exceeds the difference between the annual proffered wage and the Beneficiary's wages. As the Director's decision notes, however, the Petitioner filed immigrant petitions for other beneficiaries that were pending or approved as of this petition's priority date, or submitted thereafter. The Petitioner must therefore demonstrate its ability to pay the combined proffered wages of this and its other applicable petitions.

The Petitioner asserts that USCIS lacks authority to require payment of combined proffered wages. It notes that the regulations and Agency policy do not expressly require a petitioner to demonstrate its ability to pay combined proffered wages. However, under 8 C.F.R. § 204.5(g)(2), a petitioner must demonstrate its ability to pay the proffered wage of each petition it files until a beneficiary obtains lawful permanent residence. It therefore follows that a petitioner must demonstrate its ability to pay combined proffered wages of other pending petitions, from the current petition's priority date until the other beneficiaries obtain lawful permanent residence.

Also, precedent case law states that demonstration of an ability to pay a proffered wage constitutes part of a petitioner's obligation to establish "a realistic job offer." *Matter of Great Wall*, 16 I&N Dec. 142, 144-45 (Acting Reg'l Comm'r 1977). Under the Petitioner's reasoning, a business with \$50,000 in annual net income or net current assets could establish its ability to pay an infinite number of foreign nationals at proffered wages of \$50,000 or less. But many of those job offers would not be realistic because a petitioner would lack sufficient resources to pay an infinite number of foreign nationals. Thus, to prevent unrealistic job offers, a petitioner must demonstrate its ability to pay combined proffered wages. See *Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (affirming our revocation of a petition's approval where, as of the filing's grant, the petitioner did not demonstrate its ability to pay combined proffered wages).

The Petitioner also asserts that it need not demonstrate its ability to pay combined proffered wages because it paid the Beneficiary the prorated proffered wage in 2016. As previously discussed,

however, USCIS policy does not permit the Petitioner to prorate the Beneficiary's proffered wage. Because the Petitioner did not pay the Beneficiary's full proffered wage in 2016, the Petitioner must demonstrate its ability to pay combined proffered wages that year.

The Petitioner provides a chart listing seven other of its immigrant petitions that were pending or approved as of [REDACTED] 2016, or filed thereafter. The chart indicates that the proffered wages of these petitions total \$577,595. The Petitioner provides evidence that it paid the beneficiaries total 2016 wages of \$323,367.84. Contrary to this information, the Petitioner asserts that it paid the beneficiaries more than their total proffered wages. But the Petitioner compares its wage payments not to the total proffered wages, but to the total amount of *prorated* proffered wages. As previously discussed, USCIS policy does not permit the Petitioner to prorate proffered wages. Thus, the record indicates that the Petitioner paid the other beneficiaries \$254,227.16 less than their total proffered wages in 2016. The record also indicates that the Petitioner lacked sufficient net income or net current assets to cover that difference. In addition, USCIS records indicate that the Petitioner omitted at least one other petition from its chart.³ The Petitioner therefore has not demonstrated its ability to pay the combined proffered wages of its applicable petitions in 2016.

As previously indicated, in determining a petitioner's ability to pay a proffered wage, we may also consider factors beyond its wages paid, net income, and net current assets. Under *Sonegawa*, we may consider: the number of years a petitioner has conducted business; its number of employees; the growth of its business; its incurrence of uncharacteristic losses or expenses; its reputation in its industry; a beneficiary's replacement of a current employee or outsourced service; or other evidence of a petitioner's ability to pay a proffered wage. *Matter of Sonegawa*, 12 I&N Dec. at 614-15.

Here, the record indicates the Petitioner's continuous business operations since 2011 and its employment of 16 people. Its tax returns show that its gross revenues and wages increased from 2015 to 2016, but the record does not contain information to establish a historical pattern of growth (nothing prior to 2015 was submitted) and the Petitioner does not indicate the incurrence of uncharacteristic losses or expenses, its possession of an outstanding reputation in its industry, or the Beneficiary's replacement of a current employee or outsourced service. Also, unlike the petitioner in *Sonegawa*, the Petitioner here must demonstrate its ability to pay the combined proffered wages of multiple petitions. Finally, although the Petitioner contends that we should prorate the proffered wage in 2016, the time period between the priority date and the end of the year represents a significant period of time over which the Petitioner must demonstrate its ability to pay. Considering the timing of the priority date with the negative factors discussed above, we do not find that the Petitioner has demonstrated its ability to pay the proffered wage for 2016 through a totality of the circumstances analysis.

For the foregoing reasons, the Petitioner has not demonstrated its ability to pay the proffered wage from the petition's priority date onward.⁴

³ USCIS records identify the other petition by receipt number [REDACTED]

⁴ In any future filings in this matter, the Petitioner must provide the proffered wage and priority date of the omitted

III. THE JOB OFFER

Although unaddressed by the Director, the record also does not establish the Petitioner's intention to permanently employ the Beneficiary in the offered position.

A business may file an immigrant petition if it is "desiring and intending to employ [a foreign national] within the United States." Section 204(a)(1)(F) of the Act. A petitioner must intend to employ a beneficiary under the terms and conditions stated in an accompanying labor certification. See *Matter of Izdebska*, 12 I&N Dec. 54, 55 (Reg'l Comm'r 1966) (affirming a denial where, contrary to the accompanying labor certification, a petitioner did not intend to employ a beneficiary as a domestic worker on a full-time, live-in basis).

Here, the labor certification states the Petitioner's intention to permanently employ the Beneficiary as a software engineer from its office and at client sites. On a visit to the Petitioner's office in [REDACTED] 2017, an employee of the Petitioner told USCIS officers that the Beneficiary would work at the site of the company's only client. When the officers went to the office of the purported client, however, a site manager told them that the client abandoned the office in [REDACTED] 2017 and ceased doing business.

The reported closing of the Petitioner's only client casts doubt on the Petitioner's intention to permanently employ the Beneficiary in the offered position. In any future filings in this matter, the Petitioner must explain the status of its client and submit evidence establishing its intention to permanently employ the Beneficiary in the offered position.

IV. CONCLUSION

The record on appeal does not establish the Petitioner's ability to pay the proffered wage from the petition's priority date onward. We will therefore affirm the Director's decision.

ORDER: The appeal is dismissed.

Cite as *Matter of I- LLC*, ID# 1520950 (AAO June 29, 2018)

petition. The Petitioner must also provide required evidence of its ability to pay the proffered wage in 2017, if available. The Petitioner may also submit evidence of any wages it paid the omitted beneficiary in 2016, or additional evidence of its ability to pay, including materials in support of the *Sonegawa* factors.